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Case Comments

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ADVERSE POSSESSION—WHEN POSSESSION OF JUNIOR PATENTEE RESTRICTED TO PROPERTY INCLOSED, STATED.—Plaintiff owned and was in actual possession of a boundary of land in Perry county within the Iron Stamper patent for 12,000 acres and being all that part of the patent which is in the present county of Perry. Defendant entered upon plaintiff's boundary under a junior patent for 500 acres which embraced part of the land in plaintiff's senior patent and has been in adverse possession of this land for more than 30 years, but has actually enclosed only a part of it. Held, when the senior patentee is in actual possession of his boundary, the junior patentee is deemed to be in actual possession of only so much of the land as he actually encloses. *Kentucky Union Co.* v. *Hevner*, 210 Ky. 121, 275 S. W. 513.

A junior patent or grant has usually been held to give color of title. *East Tenn. Iron & Coal Co.* v. *Wiggin, et al.*, 68 Fed. 446, 15 C. C. A. 510. But the fact that the claimant has color of title does not dispense with the necessity of a possession which is actual. *Doe ex dem. Alabama State Land Co.* v. *McCullough, et al.*, 155 Ala. 246, 46 So. 472; *Herbage v. McKee*, 82 Neb. 354, 117 N. W. 706; *Faulke* v. *Bond*, 41 N. J. L. 527; *Ward* v. *Box*, 66 Tex. 596, 3 S. W. 93; *Illinois Steel Co.* v. *Bilot*, 109 Wis. 418, 84 N. W. 855, 43 Am. St. Rep. 905. The same doctrine is recognized and applied in a long line of Kentucky cases. *Thomas* v. *Harrow*, 4 Bibb. 563; *Roberts* v. *Sanders*, 3 A. K. Marsh 28; *Franklin Academy* v. *Hall*, 16 B. Mon. 472; *Farmer* v. *Lyons*, 87 Ky. 421, 9 S. W. 248, 10 K. L. R. 375; *Middlesboro Waterworks* v. *Neal*, 105 Ky. 586, 49 S. W. 248, 20 K. L. R. 1403; *Bryant v. Strunk*, 151 Ky. 97, 151 S. W. 381.

The decisions of the courts of this state as to the extent of the possession of the senior and junior patentee are numerous and consistent. An entrant who goes upon a boundary under a junior patent which is entirely or partly within a senior grant or survey will be deemed to be in the actual possession of only so much of the land as he actually encloses, if the owner of the senior grant is in the actual possession of his boundary. *Richey* v. *Owsley*, 137 Ky. 68, 121 S. W. 1017; Id. 143 Ky. 1, 135 S. W. 439. Where the senior patentee occupies any portion of the land covered by his patents, his possession is actual, coextensive with the boundaries stated in his patent; and in such case the adverse entrant is deemed to acquire actual possession of only so much of the land as he disseises the legal title holder of by actual enclosure or other physical occupancy equivalent thereto. *Mann* v. *Cavanaugh*, 110 Ky. 776, 62 S. W. 854; *Kentucky Land and Improvement Co.* v. *Crabtree*, 113 Ky. 992, 70 S. W. 31; Combs v. Stacy, 147 Ky. 222, 144 S. W. 24; *Hapson* v. *Cunningham*, et al., 161 Ky. 162, 170 S. W. 523. The rule is the same in other jurisdictions. *Zundel* v. *Baldwin*, 114 Ala. 28, 21 So. 420; *Ozark Plateau Land Co.* v. *Hays*, 105 Mo. 43, 16 S. W. 959.

The chief exception to the rule limiting the junior patentee's possession to what he actually encloses is in cases where the junior

patentee enters first; in such cases his possession extends to his boundary and will not be interrupted by a subsequent entry of the senior patentee outside of the lap. *Kentucky Land & Irrigation Co.* v. *Reynolds*, 29 K. L. R. 1389, 60 S. W. 635.

The ultimate effect of the rule laid down in the principal case is to protect the holder of the legal title and determine the extent of his estate solely by his muniments. W. D. S.

BANKS AND BANKING—COMBINED BANK AND TRUST COMPANY HELD ENTITLED TO ACT AS AN INSURANCE AGENT—The appellee is a corporation organized under the laws of Kentucky. It was given all the powers usually incident to a bank and trust company, but when it applied for a license to act as agent for several insurance companies, it was refused because it was a corporation. The lower court issued a mandatory injunction against the insurance commissioner and the court on appeal affirmed the judgment. *Saufley, Insurance Commissioner* v. *Lincoln Bank and Trust Company*, 210 Ky. 346, 275 S. W. 802.

Under some statutes a license cannot be issued to a corporation as agent, *Shehan* v. *Tanebaum*, 121 Md. 283, 88 A. 146. In the present case the company complied with the provisions of Kentucky Statutes 612a as to the organization. It had also complied with the statutory provision 606 as to the conditions of issuance; therefore it was entitled to a license as a matter of right. *United States* v. *Ingham*, 38 App. (D. C.) 379; *Wallace* v. *Ferguson*, 70 Oregon 306, 140 Pac. 742. These cases also provide that the commissioner cannot prescribe additional conditions, or use arbitary power.

A corporation may act as an insurance agent, although the statute requires the applicant for a license to be a person of good moral character. Corporations may be authorized to act through persons who possess the moral character and other qualifications necessary to entitle them to a license. *William Messer Company* v. *Rothstein*, 129 App. Div. 215, 113 N. Y. State 772.

The Kentucky courts lay down the same rule as that laid down in the New York court in *William Messer Company* v. *Rothstein*, 129 App. Div. 215, for they say that a corporation is not prevented from acting as an insurance agent. *Rogers* v. *Ramey*, 198 Ky. 138, 248 S. W. 254. As a general rule a corporation has only those powers granted in its charter. *Farmers' and Traders Bank* v. *Thixton, Millet and Company*, 199 Ky. 69, 250 S. W. 504. In the case at hand the corporation was given the right to carry on a combined business, that of a bank and trust company. The charter of this company did not give them a right to act as an insurance agent, but under Kentucky Statutes 606 and 612a that right must be given to them. R. C. S.

BREACH OF PEACE—MERE MARCH OF MASKED PERSONS NOT BREACH OF PEACE.—A Ku Klux Klan parade was advertised to take place the following Monday. Sentiment was divided; much antagonism was felt

toward the Klan; and it had been made an issue in the presidential campaign then in progress. At a meeting held on Saturday, and attended by judicial and peace officers of the city, the judicial officers were of opinion that in the existing state of public feeling a parade of masked persons of the Klan would constitute a breach of the peace. The Klan was requested to desist from action. The parade took place, being led by the defendant, who marched in front unmasked. One of the banners displayed contained the words, "Who said we cannot march?" There was no disorder, though a feeling of apprehension causing some of the citizens to go to their homes. Held that under the circumstances, it was a question for the jury as to whether a breach of the peace was committed. *West* v. *Commonwealth*, 208 Ky. 735, 271 S. W. 1079.

By article 1 of the amendments to the United States Constitution, Congress is prohibited from making any law respecting "the right of the people peaceably to assemble;" and the bill of rights of the Kentucky Constitution, at section 1, article 6, declares the inherent and inalienable "right of assembling together in a peaceable manner for their common good." It is thus seen that the only limitation on the right of assembly is that it must be peaceable; and the question arises as to what acts will not be peaceable, so as to constitute a breach of the peace. Blackstone says that offenses against the public peace "are either such as are an actual breach of the peace, or constructively so, by tending to make others break it." IV. Bl. 142. "To lay a foundation for criminal prosecution the peace need not be actually broken. The community is disquieted by any act tending to the breach of such sort and proximity as to create disturbing apprehensions in the minds of the lookers-on." Bishop's New Criminal Law, Vol. 1, page 539. In *Delk* v. *Commonwealth*, 166 Ky. 39, 178 S. W. 1129, no persons were disturbed but the obscene language used by appellant during his sermon was calculated to insult his hearers and provoke an assault. It was held to be a breach of the peace.

There have been few adjudications on the question of parades as constituting a breach of the peace. *In re Frazee*, 30 N. W. 72, contains a good exposition of the principle applicable to such cases. In that case, holding unconstitutional an ordinance prohibiting unlicensed parades, the court said: "These processions for political, religious, and social demonstrations are resorted to for the express purpose of keeping up unity of feeling and enthusiasm, and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are among the incidental conditions of city life, and are as such to be expected, on suitable occasions, as any other public meetings, and not necessarily any more dangerous. They are, however, capable of perversion to bad uses, and, when so perverted, may be dangerous."

In the present case, the court held that whether or not a parade amounts to a breach of the peace depends upon the conditions existing at the time and place, and the nature, purpose, and conduct of the

parade. In sending the case back to the jury, it intimated that the facts of the case were sufficient to warrant a finding of a breach of the peace. L. H. S.

CORPORATIONS—VERBAL AGREEMENT FOR PURCHASE OF CORPORATE STOCK HELD PRESENT SALE UNDER EVIDENCE.—Plaintiff entered into a verbal agreement for the purchase of two hundred shares of stock from defendants, stockholders of the Mason-Hangar Company, at a sum to be determined by a future valuation. The valuation was not made until seventeen months after the verbal agreement. Plaintiff claims that the agreement was an executory contract for the purchase of stock in the future when the parties should ascertain and agree upon the value of the stock. Held, a present sale of stock, under the evidence, at a sum to be determined by future valuation. *Coleman* v. *Hangar*, et al., 210 Ky. 309, 275 S. W. 784.

The same legal principles govern with regard to the elements of a sale of stock as apply in the case of sales generally. *Northern Central Railroad Company* v. *Walworth*, et al., 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683. *Wheeler* v. *Ocker & Ford Mfg. Co., et al.*, 162 Mich. 204, 127 N. W. 332. A sale of corporate stock is complete when the seller accepts an offer to buy and directs the bailee of the stock to deliver it to the buyer. *Club* v. *Scullin*, 235 Mo. 585, 139 S. W. 420.

An agreement as to price is essential to an executed sale. *Shepherd* v. *King*, 96 Ga. 81, 23 S. E. 113. The title generally does not pass to the buyer so long as anything remains to be done in order to determine the price. *Foley* v. *Felrath*, 98 Ala. 176, 13 So. 485. Presumptively, the title to goods sold does not pass, even where the articles sold are designated, so long as anything remains to be done to determine the price to be paid, but this is only a presumption, which is likely to be overcome by facts and circumstances indicating a contrary intent of the parties. *Bayless* v. *Collier*, 54 Mich. 1, 19 N. W. 565. But where the goods which are the subject of the sale are sufficiently identified a complete sale of them may be made without fixing an absolute price if such be the clear intention of the parties as legally evinced by the circumstances attending the sale. *Francis Chenowith Hardware Company* v. *Gray*, 104 Ala. 236, 53 Am. St. Rep. 57, 15 So. 911; *Albemarle Lumber Co.* v. *Wilcox*, 105 N. C. 34, 10 S. E. 871; *Shealy* v. *Edwards*, 73 Ala. 175, 49 Am. Rep. 43.

Being an executed present sale of the stock, the transaction is not within the terms of the Statute of Frauds and requires neither writing, full or part payment, nor receipt and acceptance. *Huntley* v. *Huntley*, 114 U. S. 392, 29 L. Ed. 130; *Joseph Schlitz Brewing Co.* v. *Missouri Poultry & Game Co.*, 287 Mo. 400, 229 S. W. 813; *Smith* v. *Fisher*, 59 Vt. 53, 7 Atl. 816.

The principal case is in harmony with sound legal principles and represents the modern tendency of the courts to allow the intention of the parties, if such is clear and legally evinced by the circumstances attending the sale, to largely control the law of sales. W. D. S.

CRIMINAL LAW—ARGUMENT OF COUNSEL THAT DEFENDANT APPEARED IN COURT ON CRUTCHES, WHEREAS HE ORDINARILY WORE AN ARTIFICIAL LEG, HELD NOT IMPROPER.—The statement objected to was made by the Commonwealth attorney and was to the affect that defendant "wears a cork leg when he is not here on trial in court and when he is here on trial in court he wears his crutches." Held not to be improper, since the evidence disclosed the fact that at the time of the combat resulting in the death of the deceased, defendant was wearing an artificial leg, and the statement of the Commonwealth's attorney was but a statement of the facts expected and competent to be proved. *Blankenship* v. *Commonwealth*, 210 Ky. 413.

The general rule is that argument of counsel which is confined to the evidence or law is not erroneous. *Fry* v. *Bennett*, 28 N. Y. 324; *Piper* v. *Boson & M. R. R.*, 72 Atl. 1024; *Louisville & N. R. Co.* v. *Vaughn's Administrator*, 183 Ky. 829, 210 S. W. 938. So long as the argument is confined to a discussion, explanation, or interpretation of the testimony properly in the record, considerable latitude is allowed to the attorney, *Welborn* v. *Earle*, 268 S. W. 982; *Shepherd* v. *Platt*, 122 N. W. 539. The rule holds even though the inference and views expressed are not correct, if the argument is honestly made and the language does not transcend the bounds of legitimate argument. *Pitts* v. *Woods*, 125 S. W. 954. The attorney may get as oratorical as he pleases. *Western & A. R. Co.* v. *York*, 58 S. E. 183; he may point his deductions with quotations of poetry. *Colorado & S. R. Co.* v. *Chiles*, 114 Pac. 661; he may use strong denunciatory language where it is sustained by that which the evidence tends to sustain. *Chicago City Ry. Co.* v. *Shreve*, 80 N. E. 1049. In *Louisville Gas Co.* v. *Ky. Heating Co.*, 132 Ky. 435, 111 S. W. 374, the court said: "Though it is never the privilege of counsel to state in the argument, as a matter of fact, anything which is not in evidence, he may with perfect propriety discuss such facts as are in evidence, without limit or restriction, and so long as he confines himself to the evidence and its application to the law, as given by the court, his conduct is not open to criticism."

In *Johnson Bros. Co.* v. *Bentley*, 56 So. 742, where the counsel stated to the jury certain facts about a witness which the evidence did not tend to show, it was held to be improper, the tendency of the statement being to induce the jury to discredit the testimony of the witness.

L. H. S.

CRIMINAL LAW—ON APPEAL FROM CONVICTION FOR CHILD DESERTION, ACCUSED CANNOT COMPLAIN AS TO TESTIMONY OF WIFE UNOBJECTED TO AND UNEXPECTED TO AT TRIAL.—Appellant was convicted of child desertion under Kentucky Statutes 331i-1 and sentenced to one year in the penitentiary. He alleged that the court erred in permitting his wife, who was non compos mentis, to testify against him. Commonwealth contended that since she was not a competent witness for any purpose, the defendant by failing to object to her testifying at all, waived her

competency as a witness. Affirmed. *Hembree* v. *Commonwealth*, 210 Ky. 333, 275 S. W. 811.

The failure of appellant to object to the witnesses testifying because incompetent, for want of mental capacity, was a waiver of objection upon that ground. *Hale* v. *Commonwealth*, 196 Ky. 44, 244 S. W. 78. If S. was so mentally deficient as to render him incompetent as a witness, such incompetency is to be treated as any other incompetent testimony, and unless objected to by the one against whom it is introduced, it will be presumed to have been waived. Whether a witness is mentally incompetent to testify is not a question for the jury, but one exclusively for the court upon the examination on the voir dire. *Owen* v. *Commonwealth*, 181 Ky. 257, 204 S. W. 262.

This case is decided on the principle that the court and the court alone can pass on the competency of a witness, and if accused does not object upon witness being presented, he must object as soon as incompetency becomes apparent. It is not enough to object to some of the questions asked; he must ask that evidence of the witness alleged to be incompetent be excluded altogether. R. C. S.

DEATH—RIGHT OF WIFE WHO DESERTS HUSBAND AND LIVES IN ADULTERY TO RECOVER FOR HUSBAND'S DEATH.—The husband and wife in this case lived together for a short time and then separated. It was shown that the wife voluntarily left the husband and lived in adultery, and that they never lived together as man and wife afterwards. The parties were never divorced. The husband was killed in a railroad accident and his administrator recovered $7,500.00 for his death. While this action was pending, the wife died and her administrator brought this suit against her husband's administrator to recover the amount collected from the railroad company. Held, that the amount recovered was not a part of the husband's estate and the deserting wife was entitled to the damages recovered for her husband's death. Circuit court gave judgment for the defendant but on appeal the judgment was reversed. *Napier's Administrator* v. *Napier's Administrator*, 210 Ky. 163, 275 S. W. 379.

The defendant administrator relied on section 2133 of the Kentucky Statutes to defeat the plaintiff's action. The statute is as follows: If the wife voluntarily leave her husband and live in adultery, or if the husband voluntarily leave his wife and live in adultery, the party so offending shall forfeit all right and interest in and to the property and estate of the other, unless they afterwards become reconciled and live together as husband and wife. This statute means that the adultery of the wife after she has voluntarily left her husband forfeits all her interest in her husband's estate. *McQuinn*, v. *McQuinn* 22 R. 1770, 61 S. W. 358. Under the facts in this case, if the amount recovered by the husband's administrator was a part of the estate, the deserting wife was not entitled. *Flood* v. *Flood*, 5 Bush 167. The husband's administrator sued for causing the intestate's death under sec-

tion 6 of the Kentucky Statutes and by that statute the amount recovered goes to the persons named therein. It cannot therefore be a part of the decedent's estate. *Surges* v. *Sturges*, 311 R. 537, 102 S. W. 884. Since the husband had no interest in the fund in his lifetime and his estate took no interest in it at his death it is not a part of the estate and must go to the persons named therein. *O'Malley* v. *McLean*, 13 Ky. 1, 67 S. W. 11; *Archer* v. *Bowling*, 166 Ky. 139, 179 S. W. 15; *Dishon* v. *Dishon*, 187 Ky. 497, 219 S. W. 794. The amount recovered not being a part of the estate, section 2133 of the Kentucky Statutes will not apply.

A similar case was before the court in *Bradley* v. *Bradley's Admrs.*, 178 Ky. 239, 198 S. W. 905. There the deserting wife who had subsequently lived in adultery was allowed to recover upon an insurance policy of her husband. Section 2133 of the statutes did not bar her recovery because the court held that the insurance was not a part of the deceased husband's estate. A. H. T.

ELECTIONS—BALLOTS MAY BE COUNTED TO REBUT PRESUMPTION OF CORRECTNESS ONLY WHEN THEY HAVE BEEN SO PRESERVED THAT THEIR IDENTITY IS ASSURED.—A. and B. were candidaes for nomination to the office of sheriff. B. received more votes than A. and was awarded the certificate of nomination. Then A. instituted a contest for the nomination upon the ground that by fraud or mistake the election officers in the various precincts failed to count and certify for him all the votes received by him and did count and certify for B. more votes than B. had received. The purpose of the contest was to obtain a recount of the ballots. After hearing the evidence as to the preservation of the identity of the ballots the trial court overruled contestant's motion for a recount. From that judgment this appeal is brought. Held, where ballots are so kept that their identity is saved they may be recounted but before recount is allowed the identity of the ballots must be proven and it must also be proven that the ballots have not been tampered with since the election. Affirmed. *Hicks* v. *Kimbro*, 210 Ky. 265, 275 S. W. 814.

The rule regarding recounting has been ably stated by McCrary in his work on Elections, section 471, "ballots to be received in evidence must have remained in the custody of the proper officers of the law from the time of the original official count until they are produced before the proper court or officer; and if it appears that they have been handled by unauthorized persons, or that they have been left in an improper or exposed place they cannot be offered to overcome the official count." Judge Hobson in the case of *Bailey* v. *Hurst*, 24 Ky. L. R. 508, 68 S. W. 867, says that McCrary's view represents the law in this state. In *Edwards* v. *Logan*, 114 Ky. 312, 70 S. W. 852, the doctrine laid down in *Bailey* v. *Hurst* was discussed, elaborated upon and followed. *Edwards* v. *Logan* has been cited with approval many times since. The rule which is declared therein has never been questioned by this court. *Thomas* v. *Marshall*, 160 Ky. 168, 169 S. W. 615. R. P. M.

ELECTIONS—IF FACTS ALLEGED SHOW ELIGIBILITY TO HOLD OFFICE, NOT NECESSARY FOR CONTESTANT TO ALLEGE THAT HE WAS ELIGIBLE—ALLEGATION OF BRIBERY IN ELECTION NEED NOT AVER THAT BRIBERY AFFECTED RESULT.—Plaintiff and defendants were opponents in a primary election for county judge. The commissioner of election finally awarded the certificate of election to one of the defendants. Plaintiff served notice and grounds of contest. On the following day he served amended notice and grounds of contest. Plaintiff alleged facts showing that he was eligible to hold the office in question; that he was a candidate for the office; that his name appeared on the ballot, and that there had been bribery practiced by his opponents. Defendants claimed that showing eligibility was insufficient and that it was error not to aver that alleged bribery affected the result of the election. The court sustained a demurrer to the notice and amended notice of contest and dismissed the proceeding. Plaintiff appealed. The court on appeal reversed the lower court's opinion. *Bingham* v. *Smith and Duff*, 210 Ky. 256, 275 S. W. 810.

By Kentucky Statutes 1596a, the right to try an election contest was taken away from the board of contest and conferred upon the circuit court, with the mode of procedure prescribed. *Wilson* v. *Tye*, 122 Ky. 508, 92 S. W. 295. It is not necessary that a contestant allege eligibility for the office in controversy. *Potts* v. *Campbell* 159 Ky. 328.

It has been held in times past, in this and other states that to make an election void on the grounds of certain irregularities, it was necessary to show that the result of the election was affected thereby. *People* v. *Cicott*, 16 Mich. 283; *Taylor* v. *Taylor*, 10 Minn. 107; *Dobyns* v.*Weadon*, 50 Ind. 298; *Scholl* v. *Bell*, 125 Ky. 750.

In some jurisdictions a sworn notice of protest alleging facts sufficient to establish that illegal votes were cast and counted for contestee, which if rejected would change the result of the election, establishes a prima facie case. *Manalo* v. *Sevilla*, 24 Philippine 609. However, if there are only facts to raise a suspicion or a mere conjecture they will not be sufficient. *Hardin* v. *Horn*, 184 Ky. 548, 212 S. W. 573.

The Kentucky Statutes seems to be in conflict with some of the earlier Kentucky decisions, for a Kentucky court held in *Scholl* v. *Bell*, 125 Ky. 750, 102 S. W. 248, that an election will not be set aside for bribery unless the result is affected to such an extent that it cannot be determined who was elected. However, the court will go far to make an election fair. That court said, "fair elections are the basic principles of republican government and it is the determined purpose of the Court of Appeals to secure them." *Adams* v. *Roberts*, 119 Ky. 364; *Browning v. Lovett*, 29 Ky. Law Rep. 692 R. C. S.

ELECTIONS—LOSING CANDIDATE FOR PARTY NOMINATION FOR OFFICE HAS NO INHERIT RIGHT TO CONTEST SUCCESSFUL NOMINATION.—Appellant and appellee were rival candidates for the Democratic nomination for the office of jailer at the primary election, and the appellee was awarded

the certification of nomination. Within the time fixed by subsection 28 of section 1550, Kentucky Statutes, appellant undertook to institute a contest against appellee contesting the nomination. He prepared notice informing appellee of the time and place of contest, but this notice was signed by no one. About the same time attorneys for appellant prepared a "petition" setting out the grounds for contest, but neither of the two documents referred in any way to the other. The statute required that the appellee be served with notice of contest five days after the certificate of nomination had been issued, such notice must recite time and place he is to make answer and also the grounds for the contest. Appellee interposed a special demurrer to the jurisdiction of the court because of the insufficiency of the notice and appellant asked leave to amend the notice and grounds of contest by signing and verifying the same. The court held the notice served to be insufficient and as the time within which a contest might have been instituted had passed, proceedings were dismissed with the court holding that a losing candidate for a party's nomination for office has no inherent right to contest successful candidate's nomination, but only such right as is granted by statute. *Hall* v. *Bryant*, 210 Ky. 260.

Practically the same question was considered in *Williams* v. *Howard*, 197 Ky. 395, and it was held that a notice contesting a nomination in a primary election is sufficient to confer jurisdiction, where it shows a clear purpose to contest, sets forth grounds of contest, and notifies the contestee, even though it further notifies him that contestant had filed a suit in the circuit court contesting the nomination.

Kentucky Statutes, section 1550, subsection 28 is the statute pertinent to the question involved here. The right to contest is granted by this statute and a valid contest may be instituted only in compliance with the terms of the statute authorizing it. The legislature in this instance passed an act which is plain and unambiguous in its provisions and in order to effect a valid election contest the terms of this statute must be strictly met. Where a statute makes procedure so clear and concise there is no practical reason for excusing a contestant who deviates from the rules laid down thereby, and certainly there is no legal one. I. J. M.

ELECTIONS—MARKING OF BALLOTS BY CLERKS IN VOTER'S PRESENCE AND PRESENCE OF OTHERS VOID.—Plaintiff and defendant were opposing candidates for jailer. According to the returns plaintiff received 505 votes and defendant 514 votes. Plaintiff contested the election. The court found that the officers in making their report had made a mistake of 14 votes which gave plaintiff a total of 519 votes, but the court also found that 8 persons who had voted for plaintiff had voted openly on the table without being sworn and deducted these 8 votes from plaintiff's total leaving him 511 votes and dismissed the contest. Held, the ballots voted openly were void under Constitution, section 147. *Kean* v. *Whittle*, 210 Ky. 273, 275 S. W. 818.

Section 147 of the Constitution provides:

"But all elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited. . . . The first General Assembly held after the adoption of this Constitution shall pass all necessary laws to enforce this provision, and shall provide that persons illiterate, blind, or in any way disabled, may have their ballots marked as herein required."

It will thus be seen that under the Constitution the election must be by secret official ballot marked by each voter in private at the polls and then and there deposited. Secret ballots are indispensable under section 147 of the Constitution. Even thin ballots will invalidate the election. *Nall* v. *Tinsley*, 107 Ky. 441, 54 S. W. 187. When the secret ballot is disregarded in a precinct, the entire vote of the precinct is void. *Banks* v. *Sargent*, 104 Ky. 843, 48 S. W. 149.

The only exception to this is in the case of persons illiterate, blind or in any way disabled. As directed by the Constitution the General Assembly made the following provision as to persons illiterate, blind or otherwise disabled:

"Any elector who declares, on oath, that, by reason of disability to read the English language, he is unable to mark his ballot, may declare his choice of candidates or of party ticket to the clerk, who, in the presence of the judges, sheriff and challengers and the elector, shall, with his pencil, mark a dot in the appropriate place for the cross-mark, to indicate the choice of the elector. The clerk shall fold and deliver the ballot to the elector, and instruct him to retire to the booth and there mark his ballot by making a cross-mark in the squares showing dots of any other squares he may desire. In all other respects he shall vote as is required of other electors. In case any person applying to vote is blind, and shall so declare on oath, the clerk shall be allowed to mark his ballot for him in the presence of other officers of the election, and the challengers allowed by law; or, in case any person shall be so physically disabled as to be unable to mark his ballot, and shall so declare, on oath, the clerk shall have the right to mark his ballot as in the case of a blind person applying to vote." section 1475, Kentucky Statutes.

Unless the voter is sworn and declares on oath that he is blind or so physically disabled as to be unable to mark his ballot, the officer has no right to mark his ballot for him, and if he so marks the ballot it is not a secret ballot as provided by the Constitution and cannot be counted. *Marilla* v. *Ratterman*, 209 Ky. 410, 273 S. W. 69.

The principal case is a rather hard one because it is clear that neither the voters nor the election officers realized that they were violating the law. But the court is bound to apply the Constitution and the statutes. W. D. S.

ELECTIONS—SECRECY OF BALLOT HELD NOT VIOLATED BY WANT OF ELECTION BOOTHS TO EXTENT REQUIRING VOTES CAST IN PRECINCT TO BE

THROWN OUT.—The appellee and contestee were both candidates for the office of jailer of Laurel county, at the regular primary election. In one precinct election booths were not constructed and votes were cast in a school house. The voters were allowed to mark ballots on tops of two school desks located on either side of election officers at a distance of nine to twelve feet. Appellee was nominated and contestee sought to have the precinct votes thrown out as in violation of Kentucky Statutes 1467 and 1550, subsection 36. This would give him the nomination. Held, secrecy of ballot was not violated to extent requiring votes to be thrown out. *Jones* v. *Steele*, 210 Ky. 205.

The statutes relative to this case as have been cited are in connection with regular and primary election laws. The gist of these is that ballot boxes are to be furnished by the sheriff of the county in which the election is to be held, and that these acts are to be "liberally construed so as to carry out its purpose and give to the voters of the different parties an opportunity to select their candidates." The votes cast could not be seen in this case, but the person of the voter was exposed. Does this constitute a breach of the secrecy of ballot clause of the statute? The Kentucky decisions hold no.

In *Muncy* v. *Duff*, 194 Ky. 303, the court says: "The constitutional provisions requiring a secret ballot is mandatory and nothing short of a substantial compliance is a valid election, but mere irregularities of the officers in the conduct of the election or in the arrangement for its holding when they do not comply with the law as to rooms and booths, the failures are irregularities and do not vitiate the election provided the essential things of the secrecy of the ballot is preserved." If there is no violation of ballot or fraud or corrupt influences practiced on or by the voter, he should not be disfranchised merely because of some irregularity or non-observance of directory provision.

Verney v. *Justice*, 86 Ky. 596, lays down the rule: "That the ballots should be secret is a constitutional and a mandatory requirement and necessary to every valid election, but in statutes which give directions to accomplish an end, and the end can be accomplished and the merits of the case uneffected, altho the directions are not complied with, the directions are considered merely directory and not mandatory.

Since in the present case, secrecy of the ballot was obtained in every way, the court held according to the weight of authority that the fundamental purpose of the law had been complied with, and there had been no violation, merely an irregularity. I. J. M.

ESCROWS—DEPOSITARY WITH INSTRUCTIONS AS TO PARTIES' AGREEMENT CONCERNING DELIVERY AND TAKING EFFECT OF INSTRUMENT NECESSARY.—Appellee had procured a fire insurance policy with appellant company, insuring him against loss by fire on his house and outbuildings, which policy was alive and in force at the time the property was destroyed by fire. The contract contained the usual ownership clause,

providing that the policy would become null and void, if there was any change and transfer in title to the insured property without consent of the insurance company. The company refused to pay the insurance, setting up as a defense that the insured did not own the property at the time it was destroyed. Prior to the fire, plaintiff's wife had instituted suit against him for alimony, and by agreement he had promised to give her a deed to the property in question if she would relinquish her rights in all of his other property and dismiss her suit. Plaintiff made the deed to his wife and left it in the bank with which he was doing business. There was an absence of proof as to whom the deed was delivered and of any instructions as to his duties as depositary. After the fire, and when the court dismissed the alimony suit, plaintiff procured the deed and gave it to his wife, he having occupied the property until it was destroyed. From a decision of the lower court peremptorily instructing the jury to find for the plaintiff the amount of the insurance, this appeal is brought. Affirmed. *Home Insurance Co. of New York* v. *Wilson*, 210 Ky. 237, 275 S. W. 691.

The question presented to the court is whether there was sufficient delivery of the deed by plaintiff as would transfer title to his wife. Did the plaintiff deliver the deed to the bank in escrow?

An "escrow" is defined as a written instrument, which by its terms imports a legal obligation, deposited by the grantor, promisor, obligor, or his agent, with a stranger or third person—that is a person not a party to the instrument—to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee, or obligee, to take effect. *Masters* v. *Clark*, 89 Ark. 191, 116 S. W. 186; *Ashford* v. *Prewitt*, 102 Ala. 264, 14 So. 663; *Hubbard* v. *Greely*, 84 Me. 340, 24 Atl. 799. Mere words creating an expectation or promise that something will be done, do not constitute that "condition" which is indispensable to an escrow. *New Jersey Ordinary* v. *Thatcher*, 41 N. J. L. 403, 32 Am. Rep. 225. There can be no escrow without conditional delivery of the instrument to a third person as a depositary. *J. I. Case Threshing Machine Co.* v. *Barnes*, 133 Ky. 321, 117 S. W. 418; *Van Valkenburg* v. *Allen*, 111 Minn. 333, 126 N. W. 1092. A deed in escrow before delivery conveys no title. *Corr* v. *Martin*, 77 N. E. 870, 37 Ind. App. 655. A "delivery" in escrow requires that the deed be absolutely delivered; that is, it must pass beyond the dominion of the grantor. The delivery to a third party in escrow, in order that it may be sufficient to vest title in the grantee, must be such as to deprive the grantor of all control over the deed. *Elliott* v. *Murray*, 225 Ill. 107, 80 N. E. 77. *Anderson* v. *Messenger*, 158 Fed. 250, 85 C. C. A. 468. There must be instructions to the depositary, which constitute the "escrow agreement," for in *Hayden* v. *Collins*, 1 Cal. App. 259, 81 Pac. 1120, the court held that there was no delivery sufficient to sustain the conveyance, where the grantor had delivered a deed to his attorney, who did not understand that it had been delivered to him beyond the power and

control of the maker, and at promisee's request, such attorney without protest surrendered the deed to her.

The deed must be delivered to a third person, and not to the grantee himself; nor to the agent or attorney of the grantor, because the possession of the grantor's attorney or agent is the grantor's possession, revocable by him. *Wier* v. *Batdorf*, 24 Neb. 83, 38 N. W. 22; *Raymond* v. *Smith*, 5 Conn. 559. Nor to the agent or attorney of the grantee, for then it is equivalent to a delivery to the grantee himself. *Hubbard* v. *Greely*, 84 Me. 340 24 Atl. 799; *Day* v. *La Casse*, 85 Me. 242, 27 Atl. 124. The depositary must be the agent of both parties. *Davis* v. *Clark*, 58 Kan. 100, 48 Pac. 563; *Watson* v. *Chandler*, 133 Ky. 757. 119 S. W. 186; *Ball* v. *Sandlin*, 176 Ky. 537, 195 S. W. 1089.

The court in holding that there was no delivery in escrow, and no transfer in title, decided in line with the great weight of authority in this country. W. F. S.

FRAUDS, STATUTE OF—PARTY MAKING VERBAL OFFER TO SELL LEASE OF TEN YEARS NOT BOUND BY ANOTHER'S WRITTEN ACCEPTANCE—WRITTEN ACCEPTANCE OF VERBAL OFFER TO SELL LEASE OF TEN YEARS WITHIN STATUTE.—A. owned a lease of twenty acres of coal land. By letter A. made an offer to the defendant, to make a lease for ten years. The offer was accepted and the consideration paid, the acceptance also being by letter. After a few days A. made a verbal offer to the plaintiff to make him a lease for ten years of the same premises that he had already leased to defendant. This offer was accepted by letter and telegram. Held that the defendant had title, and that the plaintiff's lease was void, that is that a verbal offer accepted in writing is not good under he statute. *Evans, et al.* v. *Parsons*, 210 Ky. 146, 275 S. W. 282.

Subsection 6 of section 470, Carroll's Kentucky Statutes, 1922, generally known as the statutes of frauds states, that no action shall be brought to charge any one upon any contract for the sale of real estate or any lease thereof for longer than one year, unless the contract, memorandum, or note thereof be in writing, and signed by the party therewith to be charged or his authorized agent.

A., is the person to be charged, and as he only made a verbal offer to plaintiff, he cannot be held without having signed either a contract, memorandum, or note.

The case of *Williams* v. *Stifel*, 64 Mo. App. 138, 2 Mo. App. Rep'r 1097, lays down the rule, that contracts within the Statute of Frauds must be written in full; that is that both parties to the contract must sign.

The statute of frauds of Kentucky, requires that the "promise" must be in writing. *Ratliff* v. *Trout*, 29 Ky. (6 J. J. Marsh) 605.

Plaintiff is clearly defeated by the Statute of Frauds, since he has no form of writing signed by A.

Again, plaintiff cannot hold defendant even if his contract with A. should be held without the Statute of Frauds; because the defendant has prior equities. It has been held, that in a contest between equities, seniority prevails, and notice is immaterial. *Stephens* v. *Burton*, 1 Duvall 116.

To construe the statute is the only thing necessary in this case, and it is difficult to see how the case could have been decided otherwise. H. M. D.

HOMICIDE—SELF-DEFENSE INSTRUCTION PROPERLY QUALIFIED, WHERE THERE WAS EVIDENCE THAT DEFENDANT INVITED COMBAT.—Appellant was indicted and prosecuted for malicious shooting and wounding. Just prior to the shooting, appellant's victim was seated in his automobile, engaged in unfriendly conversation with the appellant's father, when the appellant arrived upon the scene and by means of profane and abusive laguage, invited a combat, which resulted in the shooting and wounding of appellant's opponent. The defendant pleaded self-defense. The judge instructed the jury that if they believed from the evidence that the defendant, when he did not believe or have reasonable grounds to believe, that his life or person was in danger at the hands of his opponent, did first wilfully and voluntarily, while armed with a pistol, invite and challenge said opponent out of an automobile to fight, and in so doing make harm and danger to himself, then the jury could not excuse defendant on the ground of self-defense. Defendant appealed the case on the ground of improper instructions to the jury. Affirmed. *Doneghy* v. *Commonwealth*, 208 Kentucky 500, 271 S. W. 586.

The rule is thoroughly established and in its general terms is universally recognized that a plea of self-defense cannot be sustained where the defendant shows that he was the aggressor and provoked the difficulty, or where he acted in retaliation. Neither state of facts is sufficient to show that necessity upon which the law of self-defense is based. *Hudson* v. *State*, 59 Tex. Crim. 650, 129 S. W. 1125; *Foutch* v. *State*, 95 Tenn. 711, 34 S. W. 423; *Stoffer* v. *State*, 15 Ohio St. 47, 86 Am. Dec. 470; *People* v. *Hecker*, 109 Cal. 541, 42 Pac. 307; *Dabney* v. *State*, 113 Ala. 38, 21 Sou. 211. Accused cannot avail himself of, or shield himself on the ground of, a necessity which he has brought about by his own fault or wrongful act. *O'Neal* v. *Com.*, 27 Ky. L. 547, 85 S. W. 745; *People* v. *Burns*, 27 Cal. A. 227, 149 Pac. 605; *State* v. *Agnesi*, 92 N. J. L. 53, 104 Atl. 299. In some jurisdictions the rule is absolute that one cannot invoke the doctrine of self-defense, when he has by his acts, words, or conduct showed a willingness to enter the conflict, or by his words or acts he has invited it, and he must be held to have brought about the necessity of slaying his adversary. *Stallworth* v. *State*, 146 Ala. 8, 41 So. 184; *Langham* v. *State*, 12 Ala. A. 46, 68 So. 504; *Skipper* v. *State*, 144 Ala. 100, 42 So. 43. It is a general rule that any insulting or opprobrious language of accused which is reasonably calculated

to lead to an affray or deadly conflict, and which provokes the difficulty, deprives one of the right of self-defense. *Harris* v. *Com.*, 140 Ky. 41, 130 S. W. 801; *State* v. *Crisp*, 170 N. C. 785, 87 S. E. 511; *State* v. *Rowell*, 75 S. C. 494, 56 S. E. 23. In some jurisdictions it is necessary that accused shall be reasonably free from fault, but it is not required that he be entirely free from blame to be entitled to a right of self-defense. *Mason* v. *State*, 88 Tex. Cr. 642, 228 S. W. 952; *Landrum* v. *State*, 79 Fla. 189, 84 So. 535. However. it is the weight of authority in this country that to excuse a homicide, it is not enough that during the course of the difficulty it became necessary for defendant to kill the deceased in order to save his own life or bodily harm; but he must also have been free from fault in provoking or continuing the difficulty which resulted in the killing. *Gambrell* v. *Com.*, 130 Ky. 513, 113 S. W. 476; *Taber* v. *Com.*, 26 Ky. L. 754, 82 S. W. 443; *Baker* v. *Kansas City Times Co.*, 2 Fed. Cas. No. 773; *People* v. *Fillippelli*, 173 N. Y. 509, 66 N. E. 402; *Henry* v. *People*, 198 Ill. 162, 65 N. E. 120.

Authorities are almost harmonious upon the point that the party who provokes the difficulty is the party at fault. In the case of *Shell* v. *Com.*, 194 Ky. 767, 240 S. W. 747, it was held that the accused did not forfeit his right of self-defense merely because he fired the first shot, where deceased brought on the difficulty by attempting to shoot accused.

The case in question was decided in accord with the great weight of authority. W. F. S.

INFANTS—MARRIED WOMEN WHO WERE MOTHERS MADE AFFIDAVITS THAT THEY WERE OF AGE, HELD ESTOPPED FROM REPUDIATING CONVEYANCES BECAUSE OF INFANCY, AND SUBSEQUENT PURCHASES FROM THEM ACQUIRED NO TITLE.—Appellee purchased the land interests of two infants paying to them the purchase money and receiving deeds for the land. Before the transaction was completed, appellee believing the grantors to be infants, inquired of them and their mother as to their ages, and both the children and their mother made affidavits to the purchaser that the children were of age. They were both married and had children. Later, on petition of the infants by their guardian, it was held that the infants were entitled to the land as a homestead, and the purchaser was required to surrender possession to the guardian. Subsequently, when the children had become of age, they sold their interest in the land to the present appellant. The first purchaser instituted suit against the second purchaser, praying a division of the property, and the latter set up as a defense the infancy of the grantors at the time they conveyed to the former. From a judgment holding that the infants were estopped from repudiating conveyances because of infancy after they had made affidavits that they were of age, and that subsequent purchasers from them acquired no title, this appeal is brought. Affirmed. *Burk, et al.* v. *Moore*, 209 Ky. 24, 272 S. W. 38.

When the question is confined to enforcing the infants' liability under an executory contract, the decisions are practically uniform that the defense of infancy is not lost by the fact that he had procured the contract by false representations that he was of full age. *Sims* v. *Everhardt*, 102 U. S. 300, 26 U. S. (Law Ed.) 87; *Tobin* v. *Spann*, 85 Ark. 556, 109 S. W. 534; *Wieland* v. *Kobick*, 110 Ill. 16, 51 Am. Rep. 676; *Hovey* v. *Hobson*, 53 Me. 451, 89 Am. Dec. 705; *International Textbook Co.* v. *Connelly*, 206 N. Y. 188, 99 N. E. 722. But where the contract has been executed, and the infant seeks to avoid the title conferred thereby in order to maintain either an action or a defense, the decisions are more conflicting. In some jurisdictions it is held that the fact that an infant at the time of entering into such transaction falsely represented to the person with whom he was dealing that he was of age does not give any validity to the transaction or estop the infant from disaffirming the same or setting up the defense of infancy, against the enforcement of any rights thereunder, and this rule has been applied to deeds, mortgages, and other contracts affecting realty. *Burdett* v. *Williams*, 30 Fed. 697; *Conrad* v. *Lane*, 26 Minn. 389, 4 N. W. 695; *Raymond* v. *General Motorcycle Sales Co.*, 230 Mass. 54, 119 N. E. 359. In other jurisdictions, false representations as to the age, in the absence of bad faith on the party of the other part of the transactions estops the infant from disaffirming the transaction. *Looney* v. *Elkhorn Land Co.*, 195 Ky. 198, 242 S. W. 27; *Asher* v. *Bennett*, 143 Ky. 361, 136 S. W. 879; *Commander* v. *Brazil*, 88 Miss. 668, 41 S. 497, 9 Lrans. 1117; *La Rosa* v. *Nichols*, 92 N. J. L. 375, 105 Atl. 201. This rule has also been applied to deeds, mortgages, and other instruments affecting an infant's realty. (Citations above.)

However, if misrepresentation as to age may work an estoppel, the other elements of estoppel must coexist in order to do so. *Putnal* v. *Walker*, 61 Fla. 720, 55 So. 844; *Kendrick* v. *Williams*, 157 Ky. 767, 164 S. W. 72; *Stevens* v. *Elliott*, 30 Okla. 41, 118 P. 407. The rule that will work an estoppel will apply only when necessary to protect the other party to the transaction from what otherwise would be a fraud. *Asher* v. *Bennett*, 143 Ky. 361, 136 S. W. 879. There must be a direct misrepresentation by the infant of his age. *Confederation Life Assoc.* v. *Kinnear*, 23 Ont. A. 497.

While it is a general principle of law that a voidable contract will not work an estoppel, yet equity in seeking justice has made an exception to the rule to the effect that an infant is estopped to rely upon his infancy against one whom he has misled by making an affidavit or direct statement to the effect that he was of full age. *Looney* v. *Elkhorn Land Co.*, 195 Ky. 198, 242 S. W. 27; *County Board of Education* v. *Hensley*, 147 Ky. 441, 144 S. W. 63; *Smith* v. *Cole*, 148 Ky. 138, 146 S. W. 30; *Adkins* v. *Adkins*, 183 Ky. 662, 210 S. W. 462.

The decision of the present case, in line with the weight of authority, holds that the infants were estopped to set up any title to the

land, and as the subsequent purchasers could only acquire what right that the infants then had, they obtained nothing by their purchase.

W. F. S.

INTOXICATING LIQUOR—EVIDENCE OF A PATH FROM HOUSE TO STILL HELD NOT SUFFICIENT FOR CONVICTION.—The appellant prosecuted this appeal from a judgment of a fine and imprisonment imposed on him as the penalty for manufacturing whiskey. The Commonwealth proved that the still was found about one-quarter to a half a mile from the house of the appellant and that from the house there was a path down a ravine and along a branch thence to the still, on an adjoining tract of land. There was no evidence introduced for the prosecution that the still was on land of the appellant and he swore that the land the still was on did not belong to him. There was no other evidence tending to connect the ownership of the still to the appellant. The court held that this path might have been used as readily by others as by the appellant and that all the proof might be admitted and yet be reconciled with his innocence. In that state of facts the court has uniformly held that the evidence was not sufficient to sustain a conviction. Reversed. *McCall* v. *Commonwealth*, 210 Ky. 336, 275 S. W. 807.

There have been a number of cases before the court where the Commonwealth has proved the existence of a path from the house to a still on the same or adjoining premises where a conviction has been sustained. Those convictions have, however, been only where there has been other evidence of ownership or possession in addition to the path. *West* v. *Commonwealth* 208 Ky. 182; *McKinney* v. *Commonwealth*, 208 Ky. 322.

The case at bar is in harmony with the rule adopted by the Alabama court which says, "Unless the evidence shows or tends to show something more than a still in the neighborhood of the defendant and a path leading therefrom in the direction of the defendant's home, a conviction of possessing a still can not stand. *Leith* v. *State*, 101 So. (Ala.) 336.

The Kentucky court in *Layer* v. *Commonwealth*, 264 S. W. 1061, said, "Liquor found on adjoining premises and a path from the house of the defendant to the place where the liquor was found was not sufficient to sustain a conviction for unlawful possession."

Thus we see that it seems to be an established and generally accepted doctrine that the mere presence of a path from the house of a dfendant to a place nearby where there was liquor or a still found, in the absence of any other proof tending to establish the ownership of the defendant, is not sufficient evidence on which to sustain a conviction.

W. B.

LANDLORD AND TENANT—A MERE AGREEMENT FOR A LEASE DOES NOT CREATE A TENANCY—OWNER OF HOTEL NOT ESTOPPED FROM OUSTING

KEEPER ON AGREEMENT TO MAKE A LEASE IF PARTIES COULD NOT AGREE ON TERMS OF LEASING—COURT WILL NOT FIX REASONABLE RENT ON PARTIES FAILURE TO AGREE ON TERMS WHEN NO LEASE CONTRACT HAS BEEN ENTERED INTO.—Plaintiff had renewed his lease with the defendant on a certain hotel in Owensboro, but before one year on the renewed lease had expired a written contract was endorsed on the lease whereby the plaintiff agreed to vacate the property in order that the defendant might enlarge the hotel, with the further stipulation that the plaintiff have the first privilege of renting when the hotel was finished if the parties could agree on the terms. When the hotel was completed the plaintiff took possession and agreed that he would enter into a written lease contract with the defendant. On strength of this the defendant permitted the plaintiff to enter into possession and later submitted a written least contract to the plaintiff which the plaintiff refused to execute. The plaintiff refused to surrender the premises to the defendant and filed this bill under the Declaratory Judgment Act for a declaration of his rights and enjoined the defendant disturbing him. Held, that no rental contract was entered into between the parties and the plaintiff was in wrongful possession of the premises. Judgment for the defendant was entered accordingly and affirmed in the appellate court. *Allen* v. *Whitely*, 209 Ky. 234, 272 S. W. 724.

This is a case where the tenant obtains possession of the property from the landlord under an agreement that he will execute a certain lease and pay a certain rent, and after he gets possession refuses to carry out the agreement or to deliver possession to the landlord. A mere agreement for a lease does not create a tenancy, or give to the party with whom it was made a right to possession, *Billings* v. *Canney*, 57 Mich. 425, 24 N. W. 159, but where the owner permits a party to go into possession under an agreement for a lease which he afterwards refuses to make, the relation of landlord and tenant does exist. The present case is not in point with the case cited above because in it there was not an actual leasing but an agreement by which a lease would be entered into if the parties could agree on the terms. In the cases of *Neppach* v. *Jordan*, 15 Oregon 308, 14 Pac. 353, and *Proctor* v. *Benson*, 149 Pac. St. 254, 24 Atl. 279, the tenant was permitted to go into possession under a contract of lease and it was held that tenancy existed. But in both of these cases there was an actual lease contract and not merely an agreement to lease at some future time. The case at bar falls within the rule laid down in *People* v. *Gillis*, 24 Wend. 201, and *McGarth* v. *Boston*, 103 Mass. 369, which says that an agreement to lease, to be executed at some future time is not a contract of leasing and the party who enters as tenant is a wrongdoer in possession of the property and holding without right.

The plaintiff insists that as the defendant allowed him to enter into possession of the property and make expenditures in the hotel business, he is estopped from ousting him from the premises. The case of *Irvine* v. *Scott*, 85 Ky. 260, 3 S. W. 163, held that as the landlord had permitted the tenant to fill the rented stable with provender to last

the ensuing year, and then did not demand possession but an increased rent, he was estopped to evict the tenant. But in this case the relation of landlord and tenant existed, the tenant holding over by the landlord's consent with payment of monthly rent for two months after the day the tenant should have quit the premises. It is clear in such case where there is a written contract for a lease or for a renewal of a lease that estoppel will apply but in a case like the present where the plaintiff is in possession under an agreement to lease if the terms be agreed upon and not under a written contract to lease or renew the lease, estoppel cannot apply. The case at bar is also distinguished from *Irvine* v. *Scott* in that the defendant in the former allowed the plaintiff to enter upon his confidence in the plaintiff's complying with the promise to execute a lease later.

The plaintiff contends that as the parties were unable to agree on the rent the court should fix, under the evidence a reasonable rent for the property. This would have been proper had there been a written contract for the renewal of the lease. *Slade* v. *Lexington*, 14 Ky. 214; *Joy* v. *St. Louis*, 138 U. S. 1. In these cases the substantial part of the agreement between the landlord and tenant was the written contract or the contract for the renewal of the leases and the fixing the rent by the court was only secondary. In the present case there was no contract for the court to take cognizance of. Therefore it was not within the court's authority to fix the terms of leasing and to do so would be making a contract which the parties did not make themselves. A. H. T.

MASTER AND SERVANT—INJURY TO EMPLOYEE BY CO-EMPLOYEE PLAYING WITH AIR HOSE—HELD NOT ACCIDENT RISING OUT OF AND IN CAUSE OF EMPLOYMENT.—A. was employed in B.'s factory making boxes. B. had installed compressed air for the purpose of removing sawdust from the machinery. A. and C. conceived the idea of cleaning their clothes with the air. A. cleaned the clothes of B., and as a matter of play blew B.'s hat off. B. in turn was cleaning A.'s clothes, and applied the air hose to A.'s person in such a manner as to cause a rupture from which death resulted. Appellees, wife and heirs of the deceased, claim compensation under Kentucky Statutes, section 4880, the Workmen's Compensation Act. Held that the injury did not accrue from an accident arising out of the cause of employment. *Haleswood, et al.* v. *Standard Sanitary Manufacturing Co.*, 208 Ky. 618, 271 S. W. 687.

Cases of this nature seem to be few in number. However, in the case of *Federal Rubber Manufacturing Co.* v. *Hovatie. et al.*, 156 N. W. 143. the appellee was injuried by a co-employee applying compressed air to his person. It was held that the employers were not liable. This case is much stronger for the employers than the principal case, for the employers had expressly forbidden the use of the air for any other purpose than the cleaning of the machinery.

In order to place the injury under the compensation act; (1) the injury must be sustained by accident, (2) the accident must arise out

of the employment, (3) the accident must accrue within the course of the employment. It is held, that the accident need not have been forseen or expected; but after the event it must appear to have had it origin in a risk connected with the employment, and to have flowed from the source as a rational consequence. *In re Employers' Liability Assurance Corporation*, 215 Mass. 497, 102 N. E. 697.

Where the employee is injuried through some sporting act of his own, the rule is that the accident does not "arise out of the employment, although it may arise in the course of" it. *Meader* v. *Hilman Ehrman Co.*, 1 Ky. Leading Decisions 45.

Under the English act, it has been held that accident resulting from "larking" or playing with machinery cannot be held to arise out of the course of employment. *Furniss* v. *Gatside*, 3 Butterworth's W. C. C. 411.

From the above cases the conclusion is drawn, that accident arising through play or some cause that could not have originated in connected with the employment, to be without the course of the employment; thus Kentucky Statutes, section 4880, will not apply in this case.

This case not only seems to be with the weight of authority but also seems to reach a just result. H. M. D.

MORTGAGES—ACQUISITION BY SENIOR MORTGAGEE OF MORTGAGORS' INTEREST DOES NOT RESULT IN MERGER UNLESS INTENTION TO MERGE CLEARLY APPEARS.

ESTATES—MERGER OF TITLE AND LIEN OCCURS ONLY WHEN THEY CENTER IN SAME PERSON WITHOUT INTERVENING EQUITIES.

MORTGAGES—RULE THAT SENIOR MORTGAGEES' ACQUISITION OF MORTGAGORS' INTEREST DOES NOT RESULT IN MERGER BASED ON PRESUMPTION THAT HE INTENDS TO KEEP HIS LIEN ALIVE AS AGAINST INTERVENING LIEN OR TITLE.

On Dec. 12, 1919, T. V. Cole conveyed to E. V. Waterfield by deed, which was duly recorded in the clerk's office, a tract of land. In consideration W. executed three notes payable annually with interest. Later plaintiff purchased the notes and they were duly assigned to him. After each of the three notes became due, and in settlement of same, W. conveyed the land to plaintiff by deed. At this time the land was worth less than the amount of the said notes. On Sept. 28, 1920, and after the execution of the notes and the recording of the deed reserving a lien to secure their payment, and while the notes were in plaintiff's hands unpaid, W. gave a mortgage of a smaller amount upon the same land to one Broach and Co., which was also recorded. Plaintiff charges that B. is now the holder of the said mortgage by assignment, and said claim is unfounded and is a cloud on his title to the said land. The plaintiff now asks the court to quiet his title to the land and that the defendant B. be required to set up his claim, and if the title cannot be quieted that the land be sold and the proceeds first applied to plaintiff's debts, and the remainder, after payment of court costs, be applied to the payment of defendant's mortgage. Held, that the defendant,

junior mortgagee, be required to set up his claim, to the end that plaintiff may be adjudged a prior lien and have the land sold for payment of his debt, interest and cost, if the junior mortgage is valid, or have its title quieted if the junior mortgage is invalid. *Purdom* v. *Broach*, 210 Ky. 161, 275 S. W. 365.

The demurrer to the plainitff's petition was sustained in the lower court presumably on the ground that plaintiff's lien was merged in the subsequently acquired title, and its priority over the mortgage was thereby lost. "The prevailing rule, as announced by the majority of the state courts and by the U. S. Sup. Court, is that the question of merger is always one of intention, and, unless an intention to merge clearly appears, no merger results from the acquirement by the holder of the senior mortgage of the interest of the mortgagor, and the senior mortgage retains its priority as against all junior or intervening liens upon the mortgaged property; and this is true, whether the interest of the motgagor is the legal title to the land or the mere equity of redempion. It is only when the fee and the lien center in the same person, without any intervening claims, liens or equities, that a merger of the title and the lien will take place." 19 R. C. L. 489.

The U. S. Sup. Court in *Factor's & T. Ins. Co.* v. *Murphy*, 111 U. S. 783, thus states the rule: "Where an encumbrancer by mortgage or otherwise becomes the owner of the legal title or of the equity of redemption, the merger will not be held to take place if it be apparent that it was not the intention of the owner, or if, in the absence of any intention, said merger was against his manifest interest." The court in *Wiedemann* v. *Crawford*, 158 Ky. 657, discusses this subject very thoroughly and comes to the conclusion that no merger will result where it is the expressed intention of the one acquiring the greater estate that his acquisition thereof shall not operate to extinguish the lesser estate held by him, or where in the absence of such expression the circumstances surrounding the transaction show that it was not his purpose that the merger should result. Perry on Trusts. section 347, says: "Where the legal and equitable estate in the same land becomes vested in the same person, the equitable will merge in the legal estate; for a man cannot be trustee for himself, nor hold the fee, which embraces the whole estate, and at the same time hold the several parts separate from the whole. But in order that this may be true, the two estates must be commensurate with each other; or the legal estate must be more exensive or comprehensive than the equitable.

"The equitable fee cannot merge in a partial or particular legal estate. And there will be no merger, if it is contrary to the intention of the parties."

Running throughout all the textbooks and the authorities is the prevailing idea that where it is against the expressed intention, or it is apparent that it was not the intention of the owner, or where it is manifestly against his interest, no merger will be declared. The court in rendering it's decision has clearly followed this established rule.

M. W. M.

SEARCHES AND SEIZURES—WOODLANDS LOCATED SOME DISTANCE FROM HOUSE COULD BE SEARCHED WITHOUT WARRANT—"HOUSES" AND "POSSESSIONS."—A still was discovered some 250 or 300 yards from the house in a small woodland on defendant's farm. The officers had received advance information and had made the search without a warrant. Now, the defendant contends that all the evidence was incompetent since the search was made without a warrant, contrary to section 10 of the Constitution, which guarantees security "in their persons, houses, papers, and possessions from unreasonable search and seizure." Held, woodlands situated some distance from the house are not included in the term "houses and possessions," and therefore not protected by the Constitution. *Simmons* v. *Commonwealth*, 210 Ky. 33, 275 S. W. 369.

Two analogous cases involving the question here adjudicated upon have been decided by the Court of Appeals within the last three years. These are *Brent* v. *Commonwealth* (1922), 194 Ky. 504, 240 S. W. 45, and *Cotton* v. *Commonwealth* (1923), 200 Ky. 349, 254 S. W. 1061. Construing the meaning of the word "possessions," in the Brent case the court said: "It is our opinion that the doctrine of eiusdem generis applies and that, in construing the term "possessions," we must have regard for the particular and specific words preceding it and confine its application to things of like kind. . . . In our opinion it was intended to mean the intimate things about one's person, like in kind to those previously denominated, but further than that we would not attempt to define its meaning, as, whenever invoked, its proper application must be determined upon the particular facts and conditions then under consideration." In both of these cases it was decided that the word "possessions" did not include woodlands not immediately adjacent to the house, and not used and connected therewith.

In the Brent case the woodland was 350 to 400 yards from the house, and in the Cotton case the thicket was 500 yards from the house, while in the case at hand the woodland was from 250 to 300 yards away from the house, the defendant testifying one-half mile. It was not used in connection therewith, nor was it immediately adjacent thereto.

But what does the court mean when it says "immediately adjacent thereto and used and connected therewith?" In *Childers* v. *Commonwealth*, 198 Ky. 148, 250 S. W. 106, the court used the following language:

"Both the pond and the garden were appurtenant to and used in connection with the residence, and so closely situated thereto as to be a part thereof. It would be practically if not utterly impossible to enjoy the full and free use of the "houses" and "possessions" without the garden and pond in such close proximity thereto as described in the evidence." The pond and garden were within a stone's throw of the house. Further, "Without undertaking to definitely fix the space immediately around the residence of an accused, into which official searchers may not go in their efforts to obtain evidence without a valid search warrant, it will suffice for our present purpose to say that the

facts in this case show that the searchers were upon premises so inseparable from and immediately adjacent to appellant's home as to be a part thereof, the entry of which was an invasion of the privacy of the home, . . ."

That the court is not alone in adopting this construction of the word, see *State* v. *Zugras*, 267 S. W. (Mo.) 804; *Reutlinger* v. *State*, 234 P. (Okla.) 224; *Ratzell* v. *State*, 228 P. (Okla.) 166; *Rogers* v. *State*, 230 P. (Okla.) 279. E. B. C.

TAXATION—STATUTE HELD NOT TO DISPENSE WITH REQUIREMENT THAT SHERIFF'S SETTLEMENT OF TAXES COLLECTED SHALL BE FILED WITH THE COUNTY COURT, THOUGH IT MAY HAVE BEEN MADE DIRECTLY WITH THE FISCAL COURT.—Sheriffs A. and B. contend that section 4146 of the Kentucky Statutes so conflicts with section 1884 that the former which is also the older is dispensed with by the latter. The lower court so held. Held, Kentucky Statutes, section 1884 does not dispense with section 4146. *Shipp* v. *Bradley and Rodes*, 210 Ky. 51, 275 S. W. 1.

The statutes provide in substance as follows (section 1884): "And he (the sheriff) shall annually settle his accounts with the court of claims or fiscal court as such collector, and may be required to settle oftener, in the discretion of said court, by order entered of record, a copy of which shall be served on the officer." This section was enacted in 1910. Section 4146 provides: "Each sheriff or collector shall, when required by the fiscal court settle his accounts of county or district taxes, and at the regular October term of each year the fiscal court shall appoint some competent person other than the Commonwealth's or county attorney to settle the accounts of the sheriff or collector of money due the county or district. The report of such settlement shall be filed in the county clerk's office, and be subject to exceptions by the sheriff or collector or county attorney who shall represent the Commonwealth and county. and the county court shall try and determine such exceptions." This section was originally a part of the Acts of 1891-92-93. The court declared that the filing of the report with the fiscal court does not dispense with the necessity for filing with the county court and having the report spread upon the records of that court. R. P. M.

TRUSTS—CONSTRUCTIVE TRUST IN REALTY BECOMES AN EXPRESS TRUST WHEN THE CONSTRUCTIVE TRUSTEE RECOGNIZES THE EXISTENCE OF THE CONSTRUCTIVE TRUST AND PROMISES TO FULFILL THE TRUST.—A. and B., husband and wife, bought a piece of land with the proceeds derived from the sale of land belong to B. A. conducted the transaction and had his name inserted in the deed as grantee without the knowledge of B.

A. and B. moved on the land and several years afterward B. first discovered that she was not named in the deed as grantee. Thereupon she complained of the fact to A. and he assured her that this land would not be subject to his debts and promised to execute a deed to her. Not-

withstanding frequent complaints on the part of B. and correspondingly frequent assurances and promises on the part of A., at A.'s death the deed was still in his name.

Held, that A's recognition of the constructive trust brought about by his fraud created a continuing and subsisting direct trust. *Huff* v. *Byers*, 209 Ky. 375, 272 S. W. 897.

This case does not come within section 2353 of Kentucky Statutes which provides: "When a deed shall be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the latter," for, it continues, "but this shall not extend to any case in which the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where the grantee in violation of some trust, shall have purchased the lands deeded with the effects of another person."

In this case the court goes into the fact that at common law an express trust may be created by parol and such is the case in Kentucky since section 7 of the statute, 29 Car. II has never been enacted in this state, giving as authority, *Smith* v. *Smith*, 121 S. W. (Ky.) 1002; *Sherley* v. *Sherley*, 31 S. W. (Ky.) 275. There are only a few states in which this section of the Statute of Frauds has not been enacted. Several of the states that originally left out this section have since enacted it. Delaware, North Carolina, South Carolina, Washington and Texas are probably the only states besides Kentucky now allowing express trusts to be created by parol, at least these do allow such to be created. *Pierson* v. *Pierson*, Del. Ch. 11; *Lee* v. *Lee*, 11 Rich. Eq. (S. C.) 574; *Cloninger* v. *Summit*, 55 N. C. 513; *Gardner* v. *Randell*, 7 S. W. (Tex.) 78, and *Roselle* v. *Vansycle*, 39 Pac. (Wash.) 270.

The court, however, makes it plain that the parol declaration of trusts will not be enforced if all the purchase price is furnished by the trustee and the one for whom the trust is declared has not an interest in the property. *Harper* v. *Harper*, 68 Ky. 176; *Sherley* v. *Sherley*, 31 S. W. (Ky.) 275. In this respect the Kentucky decisions would probably be followed by North Carolina, South Carolina and Texas; but fraud would probably not be essential to the enforcement of the trust in Delaware and Washington. (See cases cited, *supra*.) P. E. K.